No. 83-445

In The

Supreme Court of the United States

October Term, 1983

THE OAKLAND RAIDERS, a limited partnership,

Petitioner,

vs.

THE CITY OF BERKELEY, a municipal corporation

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

to the Court of Appeal of the State of California,
First Appellate District, Division Five

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Respondent, City of Berkeley, a municipal corporation, answers the Petition for Certiorari on file in this action as follows:

OPINION BELOW

The opinion of the Court of Appeal is reported at 143 Cal. App. 3d 636, which appears as "Appendix A" to the Petition for Certiorari. A previous appellate decision in the case is *Oakland Raiders v. City of Berkeley*, 65 Cal. App. 3d 623 (1976).

STATUTES INVOLVED

Berkeley Ordinance No. 4703-N. S., July 9, 1974, amends Ordinance 2805-N. S. "Licensing For The Purposes Of Revenue Certain Professions, Business, Trades and Occupations in the City of Berkeley", by adding the following paragraphs:

Section 1.2-26. PROFESSIONAL SPORTS EVENTS.

"As used in this Ordinance, 'professional sports event' shall mean any sporting activity held at any place in the City of Berkeley wherein the participants are paid or compensated for their sporting services, whether in cash, securities, or otherwise and regardless of the amount of such services. Said definition shall not include athletes or students participating in athletic events wherein such athletes or students receive scholarships, grants-in-aid or similar financial support for educational purposes.

"Section 5.9. GROSS RECEIPTS TAX ON PROFESSIONAL SPORTS EVENTS.

"Every person commencing, transacting or carrying on any professional sports event in the City of Berkeley shall pay an annual license tax of ten percent (10%) of gross receipts measured as of the time or times such event or events as to which this tax is applicable may commence, be transacted or carried on in the City of Berkeley."

STATEMENT OF THE CASE

This case arises out of the enactment by the City Council of Berkeley of an amendment to the City's business license tax. The amendment, adopted on July 9, 1974, and entitled "Professional Sports Events License Tax" (Ordinance No. 4703-N. S.) imposed a ten percent gross receipts tax on professional sports events held within the City of Berkeley.

Petitioner owns and operates a professional football team known as the Oakland Raiders ("Raiders"). From 1972 through 1975, the Raiders played certain pre-season football games at the football stadium located on the campus of the University of California within the city limits of Berkeley. Each of these games was attended by almost 50,000 people.

On July 9, 1974, the Berkeley City Council amended the existing business license tax to impose a higher rate on professional sports events than on other businesses conducted in the City. Ordinance 4703-N. S., the Professional Sports Event License Tax.

Subsequent to the enactment of the ordinance, the Raiders played four football games at the University of California Memorial Stadium in Berkeley. The games were played on August 10 and September 7, 1974, and August 10 and August 17, 1975.

On September 11, 1979, the Alameda County Superior Court entered judgment in favor of the City and against the Oakland Raiders in the amount of $160,073.00 of unpaid business license taxes, plus costs.

Except as stated above, respondent joins in the procedural history of this litigation as set forth in the Statement of the Case in the Petition for Certiorari.

SUMMARY OF ARGUMENT

The California Court of Appeal correctly decided that an amendment to Berkeley's business license tax which taxes professional sports events does not deny equal protection. *City of Berkeley v. Oakland Raiders*, 143 Cal.

App. 3d 636 (1983). Although municipalities are subject to the Equal Protection Clause of the Fourteenth Amendment in the exercise of their taxing power, they are afforded great latitude in exercising that power for general revenue raising purposes. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U. S. 356 (1973). Berkeley's Ordinance, which taxes professional sports events while excluding amateur and student athletic events, does not constitute an invalid classification. To the contrary, such a distinction is entirely consistent with a well established tradition of taxing profit-making entities while excluding non-profit organizatios. See *Walz v. Tax Commissioner*, 397 U. S. 664 (1970).

Raiders also argue that the tax constitutes an invalid classification because it taxes sports events at a higher rate than rock concerts and other events, but have failed to introduce evidence that the tax was applied in a discriminatory fashion. It is well established that parties challenging tax measures under the equal protection clause must introduce explicit evidence to demonstrate that a classification is a hostile and oppressive discrimination against particular persons and classes. *Madden v. Kentucky*, 309 U. S. 83 (1940). Petitioner has failed to make such a showing.

Petitioner also argues that Berkeley failed to show a nexus between holding a professional sports event and the resulting burden on municipal services. There is no requirement, however, that taxes collected from a particular activity must relate to the value of services provided to the activity. *Commonwealth Edison Company v. Montana*, 453 U. S. 609, 622 (1981).

ARGUMENT

I. The Professional Sports Events Tax Does Not Deny Equal Protection.

This Court has consistently upheld legislative efforts to develop flexible and varied schemes of state taxation. Petitioner claims that the professional sports event tax denies equal protection but has failed to cite a single case in which a measure has been invalidated on equal protection grounds. In *Allied Stores of Ohio v. Bowers*, 358 U. S. 522 (1959), a case relied on by petitioner, the Court upheld an Ohio statute taxing inventories that residents stored in warehouses within the state and exempting the same products if stored by non-residents.

> "The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products . . .". *Id.* at 527.

In *Carmichael v. Southern Coal and Coke Company*, 301 U. S. 495 (1936), another case cited by petitioner, the Court upheld a state unemployment insurance law despite claims that it violated equal protection by exempting certain classes of employment, such as agricultural laborers, seamen, insurance agents, domestic servants, and by excluding employers who had less than eight employees. Rejecting plaintiff's argument, the Court held:

> "Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. . . . This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation." 301 U. S. at 509 (Citations omitted.)

The Court has reiterated the traditional standard in several more recent cases, all of which support the action

taken by the City of Berkeley in the instant case. *San Antonio School District v. Rodriguez*, 411 U.S. 1, (1973); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). The City has broad discretion to develop various taxing classifications. It has properly exercised that discretion by adopting a professional sports events tax.

II. The Oakland Raiders Fail To Present Any Basis For Invalidating The Tax.

A. The Tax Is Revenue Raising, Not Regulatory.

Petitioner makes several arguments in support of its contention that a tax on professional sports events denies equal protection. First, it argues that the tax was a regulatory measure intended to prevent the Raiders from playing football games in Berkeley. This is the same issue that was resolved adversely to the Raiders nine years ago. In Oakland Raiders v. City of Berkeley, 65 Cal. App. 3d 623 (1976), the California Court of Appeal held that the challenged tax was revenue raising, not regulatory, and was a valid exercise of the city's police power. In the previous appeal, the court limited its inquiry to the substantive provisions of the ordinance, and restated the well established principle that "the motives of the legislative body exercising the taxing power are beyond the inquiry of the courts". *Id.* at 628.

In its Petition for Certiorari the Oakland Raiders once again ask the Court to examine the City Council's motives in passing the tax, now arguing that such an inquiry would demonstrate that the petitioner was denied equal protection. This argument is unpersuasive for it

is well established that in equal protection analysis as well as other forms of statutory interpretation, the courts will not re-examine the motives of individual legislators. *Minnesota v. Clover Leaf Creamery Company*, 449 U. S. 456, 463 n. 7 (1981).

B. The Classifications Established By The Tax Are Valid.

Raiders argue that the classification between professional sports events, and amateur and student athletic events is invalid.[1] Petitioner fails to recognize that the sports events tax was passed as an amendment to the business license tax and is a revenue tax imposed on the privilege of doing business in the community. Professional sports events are business activities and the City can reasonably tax those events while exempting other sporting events. Indeed, taxing professional events while exempting amateur events is consistent with a well established practice of granting tax exemptions to educational and other non-profit entities.

> [The state] has granted [tax] exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The state has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, de-

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[1]Ordinance No. 4703-N.S. provides, in relevant part:

" 'Professional sports event' . . . shall not include athletes or students participating in athletic events wherein such athletes or students receive, scholarships, grants-in-aid or similar financial support for educational purposes."

> sirable, and in the public interest. . . . *Walz v. Tax Commissioner*, 397 U.S. 664, 673 (1970).

Although the classification which appears on the face of the ordinance is clearly valid, petitioner attempts to look beyond the ordinance and implies the existence of another classification which is not expressly stated. Raiders claim that the ordinance taxes professional sports at a higher rate than other spectator events and that the City has failed to demonstrate any differences between professional football games and other events such as rock concerts that might attract 50,000 spectators. Berkeley submits that the municipality's broad authority to develop classifications for taxing purposes permits the City to impose a higher tax on professional sports events than on rock concerts. *Lehnhauser v. Lake Shore Auto Parts Company, supra,* 410 U.S. 356. Equally important, petitioner failed to meet its burden of proof on this issue. It is well established that a litigant who challenges a tax on equal protection grounds must provide an "explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it." *Madden v. Kentucky,* 309 U.S. 83 (1940). In the instant case, petitioner did not introduce any evidence that rock concerts or other events attracting 50,000 people were held in Berkeley. Thus, Raiders' assertion that the sports events tax is invalid because it applies to the Raiders while exempting other events such as "50,000 people attending . . . a rock concert" is based solely on speculation (Raiders' Petition at 9). Without a specific factual showing that similar events were held

but were not taxed, the Raiders have no factual or legal basis upon which to challenge the tax.

C. The Tax Is Not Compensation For Municipal Services.

Raiders urge that Berkeley failed to demonstrate any relationship between the tax and the burden on municipal services caused by 50,000 people attending a football game. This argument finds no support in applicable law for it is clear that Berkeley was not required to make such a showing. In *Carmichael v. Southern Coal and Coke Company, supra,* 301 U.S. 495, the Court rejected the argument that an unemployment tax was invalid because those paying it may not have contributed to the unemployment.

> "There is no requirement that there be a nexus between the subject of the tax and the evil to be met by appropriation of the proceeds. . . . Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied." *Id.* at 521-522.

More recently, the Court upheld a state coal severance tax against similar claims. "[T]here is no requirement . . . that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of services provided to the activity." *Commonwealth Edison Company v. Montana,* 453 U.S. 609, 622 (1981).

These cases clearly indicate that the City was not required to introduce cost analyses relating the tax rate

to the burden on municipal services caused by the Raiders' football games.[2]

D. The Tax Rate Is Reasonable.

Raiders urge that the ten percent tax rate is "exorbitant" and implies that the tax rate further demonstrates that the ordinance violates equal protection. The City does not concede that the tax is exorbitant. Nevertheless, it is significant that this Court has upheld gross receipts taxes which are substantially higher than ten percent and has held that a tax may be valid even if sufficiently burdensome as to render a business unprofitable. *Pittsburgh v. Alco Parking Corporation*, 417 U.S. 369 (1974), upheld a twenty percent gross receipts tax imposed on private parking lot operators even though no tax was imposed on municipal parking lots. The coal severance tax upheld in *Commonwealth Edison* may be as high as thirty percent of the sales price, yet the Court gave short shrift to plaintiff's argument that the tax was excessive. The simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial resolution. *Commonwealth Edison Company v. Montana, supra*, 453 U.S. at 627.

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[2]Although a factual showing is not required, the attendance of 50,000 spectators at an event obviously has substantial impacts on municipal services control. The large crowds create significant automotive and pedestrian congestion, particularly where, as in Berkeley, the sports facility is not located immediately adjacent to a freeway and has not been designed for transient automotive traffic. Such events also place a burden on police, fire prevention, emergency medical, sanitation and refuse collection services.

CONCLUSION

For the reasons stated above, the City of Berkeley respectfully requests that the petition for writ of certiorari be denied.

Dated: October 7, 1983

Respectfully submitted,

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